Filed 10/31/16 P. v. Fulmer CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC WAYNE FULMER,

Defendant and Appellant.

F071078

(Merced Super. Ct. No. 14CR-00319-02)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Jeanne E. Schechter, Commissioner.

Peter J. Boldin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Detjen, J. and Smith, J.

Following a contested hearing, the court found that appellant Eric Wayne Fulmer violated his parole by his failure to charge his GPS monitor. The court then reinstated parole and ordered Fulmer to serve 180 days in local custody.

On appeal, Fulmer contends the evidence is insufficient to sustain the court's finding that he violated his parole. We affirm.

FACTS

On October 28, 2014, Fulmer was released on parole on his conviction on two counts of second degree burglary. One condition of parole required Fulmer to wear a Global Positioning System device (GPS). Another one required him to "charge the GPS device at least two times per day (every 12 hours) for at least 1 full hour for each charging time." On November 5, 2014, he was taken into custody on a parole violation for failing to charge his GPS device.

On December 31, 2014, after he was again released on parole, Fulmer reported to the Merced Parole Office. On January 2, 2015, he was arrested on a parole violation for again failing to charge his GPS device.

On January 7, 2015, Parole Agent Donna Kniess filed a petition to revoke Fulmer's parole, alleging that Fulmer violated his parole by failing to charge his GPS device and allowing it to discharge completely.

On January 26, 2015, at a hearing on the petition, Kniess testified that Fulmer is required to wear a GPS ankle bracelet all the time while on parole and as a condition of parole he was required to charge it twice a day. On December 31, 2014, Fulmer reported to the parole office and Kniess placed him on a fully charged GPS device. Kniess went over the conditions of parole, talked in depth with Fulmer about charging his GPS device and she, again, instructed him to charge the GPS device twice a day. Fulmer was a transient and asked where he could charge his GPS device. Kniess told him that across the street from the parole office there was a furniture store that had electrical outlets where some parolees charged their GPS devices and that he could also charge it at the

parole office during normal business hours, from 8:00 a.m. to 5:00 p.m. The office, however, was closed on January 1, 2015.

The GPS device allowed Kniess to tell when the device was discharging and to contact Fulmer by "buzz[ing] or beep[ing] [him]." The monitoring center would also "buzz and beep" parolees to contact them. Within 12 hours after giving Fulmer the GPS device, Kniess could see that the device was discharging. Kniess "buzz[ed]" Fulmer but he did not contact her. On January 2, 2015, at 11:09 a.m., the GPS device discharged completely. Kniess sent two parole agents to the last location reported by the GPS device, but they did not locate him. However, Fulmer was located that night by police officers.

After hearing argument, the trial court found that Fulmer violated his parole. It then reinstated parole and ordered Fulmer to serve 180 days in county jail.

DISCUSSION

Fulmer contends there was no evidence presented that parolees were allowed to use the furniture store's outlets to charge GPS devices or that the store's outlets were in working condition on January 1, 2015. He further contends that no evidence was presented that Kniess informed him that the parole office was going to be closed on January 1, 2015, or that it would reopen the following day. Thus, according to Fulmer the evidence is insufficient to sustain the court's finding that he violated his parole because it failed to establish that his violation was willful. He cites *People v. Galvan* (2007) 155 Cal.App.4th 978 (*Galvan*) and *People v. Zaring* (1992) 8 Cal.App.4th 362 (*Zaring*) in support of this contention.

In *Morrissey v. Brewer* (1972) 408 U.S. 471, the United States Supreme Court held that a parolee is not entitled to the full panoply of due process rights, because parole revocation is not part of a criminal prosecution and because revocation deprives a parolee of conditional liberty, not absolute liberty; nevertheless, the high court held that a parolee

who has been detained for a parole violation is entitled to an informal probable cause hearing and a final revocation hearing. (*Id*. at pp. 480, 485, 487.)

The standard of proof required at a parole revocation hearing is a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447, Pen. Code, § 3044, subd. (a)(5).) We review for substantial evidence. (*People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681.)

"The terms 'willful' or 'willfully,' as used in penal statutes, imply 'simply a purpose or willingness to commit the act ...,' without regard to motive, intent to injure, or knowledge of the act's prohibited character. [Citation.] The terms imply that the person knows what he is doing, intends to do what he is doing, and is a free agent. [Citation.] Stated another way, the term 'willful' requires only that the prohibited act occur intentionally." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438.)

Fulmer's conditions of parole required him to "charge the GPS device at least two times per day (every 12 hours) for at least 1 full hour for each charging time." Fulmer was aware of the requirement to charge the GPS device twice a day because he had already served one parole violation for not charging it and Kniess went over this requirement in depth with Fulmer on December 31, 2014. She also told Fulmer he could charge the GPS device at the parole office during business hours or at the furniture store across the street from the parole office. However, despite having these two options to charge the GPS device and Kniess alerting him that the GPS device had to be charged, Fulmer let his GPS device completely discharge. Thus, the evidence supports the court's finding that Fulmer violated the condition of parole that required him to keep his GPS device charged.

Kniess testified that some parolees would charge their GPS device at the furniture store across the street from the parole office. Thus, the record does not support Fulmer's contention that it is devoid of evidence that the furniture store permitted parolees to charge their GPS devices at the outlets located there or that the outlets were in working

condition. Further, although the parole office was closed on January 1, 2015, Fulmer could have charged his GPS device at the parole office on January 2, 2015, prior to it discharging completely, but he did not. That Kniess may not have told Fulmer the parole office would be open that day, did not excuse his failure to charge his GPS device there because it did not prevent Fulmer from going to the parole office on January 2, 2015, or calling to see if it was open.

Moreover, *Galvan* and *Zaring* are inapposite. In *Zaring*, the defendant was 22 minutes late to a court hearing because her babysitter unexpectedly got sick and the person who was going to drive the defendant to court had to wait to first drop off the defendant's children at school. (*Zaring*¸ *supra*, 8 Cal.App.4th at p. 376.) The trial court found that by arriving late the defendant willfully violated a condition of her probation and sentenced her to prison. (*Id*. at p. 367.) In reversing this finding, this court stated:

> "We therefore conclude that the appellant was confronted with a last minute unforeseen circumstance as well as a parental responsibility common to virtually every family. Nothing in the record supports the conclusion that her conduct was the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court. However, as a result of last minute circumstances, the appellant was approximately 22 minutes late to court, having driven some 35 miles from her home to the courtroom. Collectively, we cannot in good conscience find the evidence supports the conclusion that the conduct of appellant, even assuming the order was a probationary condition, constituted a willful violation of that condition." (*Zaring*, *supra*, 8 Cal.App.4th at p. 379.)

In *Galvan*, the trial court ordered the defendant to report to probation within 24 hours of being released from custody and within 24 hours of reentering the United States. (*Galvan*, *supra*, 155 Cal.App.4th at pp. 980-981.) Thereafter, the defendant failed to appear for a probation violation hearing because he was deported before he was released from custody and he was subsequently arrested after reentering the United States. (*Id*. at p. 981.) The trial court found the defendant violated his probation by not reporting to the probation department within 24 hours of being released from custody and within 24 hours

of reentering the United States and it revoked his probation and sentenced him to prison. (*Ibid*.)

In reversing the order revoking probation, the appellate court found there was insufficient evidence to sustain a finding that the defendant's failure to report within 10 days of reentering into the United States was willful because it failed to show when the defendant was arrested after he reentered. (*Galvan, supra*, 155 Cal.App.4th at pp. 982-983.) The appellate court also found that defendant's "immediate deportation to Mexico following his release from county jail demonstrate[d] that his failure to report within 24 hours was not willful." (*Id.* at p. 984.)

Zaring is easily distinguishable because, unlike the defendant in that case, Fulmer was not confronted with a last minute, unforeseen circumstance involving parental responsibilities that prevented him from charging his GPS device. *Galvan* is also easily distinguishable because unlike the defendant in that case, Fulmer was not deported or, otherwise, prevented by circumstances beyond his control from complying with the probation condition requiring him to charge his GPS device. And, unlike *Galvan*, the record here demonstrates that he had ample opportunity to comply with the parole condition he violated by charging his GPS device at the furniture store or at the parole office prior to being taken into custody. Accordingly, we reject Fulmer's challenge to the sufficiency of the evidence to support the court's order revoking his probation.

DISPOSITION

The judgment is affirmed.